STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED March 22, 2012
v	No. 302032 Macomb Circuit Court
GEORGE ARTHUR CASS, Defendant-Appellant.	LC No. 2010-002088-FC

Before: WHITBECK, P.J., and JANSEN and K. F. KELLY, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of assault with intent to murder, MCL 750.83, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to 13 to 30 years' imprisonment for the assault with intent to murder conviction and two years' mandatory imprisonment for his felony-firearm conviction. Defendant appeals as of right. We affirm.

I. BASIC FACTS

Defendant shot his long-time girlfriend, Laurel Henderson, after a domestic dispute. Henderson is now paralyzed from the waist down.

Defendant and Henderson had been in a relationship for 12 years and had been living together for 10 of those years. On February 28, 2010, Henderson and defendant attended a chili cook-off cancer fundraiser together at Coyote Station, a bar less than a mile from their home. After a while, defendant said he was going to walk home. Henderson told defendant she could give him a ride, but then she started talking to someone and, when she turned to look for defendant, he was gone. Defendant seemed "a little aggravated" when he told Henderson he was going to leave. Henderson stayed at the bar to watch the hockey game and arrived home at approximately 7:00 p.m.

When Henderson walked in, defendant was "furious." He told Henderson he had been calling her and accused her of ignoring his calls. Defendant went into the family room and watched television while Henderson went and watched television in the living room. She made something to eat and then fell asleep on the couch.

Defendant had gone to bed, but he woke up a few hours later and started screaming at Henderson again. Henderson told defendant, "I don't need this," or "I'm out of here." Defendant "stomped out" to the garage and "stomped right back" about a minute later, approached Henderson, pressed a gun up against her, and shot her. She was close to the front door, so she crawled on her stomach to the door and opened it. She was half in and half out of the house, pushing the screen door open. Henderson called 911, told them she had been shot, gave them her address, and then yelled for help. Defendant then came and stood over Henderson, with one foot between her legs, and shot her twice in the back as she was lying on her stomach. He said, "Take that, b****."

Casey Taylor lived across the street from Henderson and defendant. Taylor was at home watching television at about 10:00 p.m. on the night of February 28, 2010, when he heard a loud noise. He went outside to investigate and saw Henderson's dog in the street with no one around. He heard Henderson yell, "help me." Taylor grabbed his shoes and cell phone and ran over to Henderson' home where he saw Henderson in the front doorway, "face down, half sticking out of the house, with the screen door pushing against her." Henderson told Taylor, "he shot me . . . in the chest . . . three times." Defendant was lying on the floor behind Henderson, about 10 feet away, and appeared to be sleeping.

Henderson was shot once in the upper left chest area, once in the lower back on the right side, and once in the middle of the back. One of the bullets hit her bladder and kidney, and she is now paralyzed from the waist down.

Defendant testified to a different version of the facts, proceeding under a theory of self-defense. Defendant had congestive heart failure, emphysema, high blood pressure, and arthritis in his spine and neck. He and Henderson drank together every day. Past arguments have turned physical. On February 28, 2010, defendant and Henderson went to the bar at about 2:30 p.m. Defendant had two beers and two shots, and left to walk home at 4:30 p.m. because he wanted to watch a Nascar race. When he got home, he watched the race and drank some wine. Henderson arrived home at about 10:00 p.m., rather than 7:00 p.m., as Henderson testified. Henderson came into the family room, where defendant was watching television, and asked if he wanted a beer. He said "no," and Henderson went to get one for herself out of the refrigerator in the garage. When she came back into the family room, defendant complained to her that she had stayed at the bar hours longer than she said she would and that she did not return his calls. They got into a heated argument. Defendant was "a little bit" angry with Henderson, and Henderson was angry with him. She started "beating on" defendant while he was sitting on the couch; she punched him in the face, bit his ear half off, and punched or kicked him in the back after he fell on the floor on his stomach.

Eventually, Henderson left the room, and defendant got up. Defendant's gun was either in or on top of a big china cabinet in the family room and, while Henderson was in the living room, defendant reached up and got the gun. Because he was bleeding, he went into the bathroom, with the gun, and dabbed his face, ear and arm. Defendant then went to lie down in the bedroom to see if he could calm down, but he did not, so after a few minutes he got back up and walked toward the kitchen. Henderson was walking toward him. Defendant was upset and did not know what Henderson was going to do, so he fired a shot into the ceiling. Henderson kept coming at him so he shot at her. He was not really aiming when he fired the first shot that

hit Henderson, and said he shot from a short distance away. Henderson then started to turn and defendant shot her again, catching her in the hip area. Defendant then passed out with Henderson lying next to him on the floor. He did not remember a third shot, nor did he recall saying "take that, b****," although he admitted it was possible. He never stood over Henderson and shot straight down into her back. The next thing defendant recalled was police or EMS telling him he was hurt and taking him in an ambulance to St. John. Defendant got five or six stitches in his ear. The parties stipulated that his blood alcohol content was .31 at 11:40 p.m. that night.

Defendant testified he was afraid for his life and he shot Henderson in self-defense. Henderson got angry very easily, that "you cannot talk to [her]," and that she was "always an aggressor." He was not sure why he stayed with her, testifying that at first they were very happy but that their relationship has since deteriorated.

Doctor Werner Spitz testified for defendant as an expert in forensic pathology. Henderson's bullet wounds were inconsistent with a person standing over her, while she lay flat on her stomach, and shooting her in the back. He opined the chest shot was fired while Henderson was bent forward in an "aggressive stance," but admitted her wounds are also consistent with a person lying on her left side when she was shot. Spitz opined the first shot to Henderson injured her spinal cord and that she could not have remained standing afterward (and it was Spitz's understanding that she did) unless defendant was supporting her in some way. Spitz also opined Henderson could not have "wriggled" away from the spot where she was first shot because of this injury and, therefore, the prosecution's theory, that the shots went in more on her side than her back because of any such movement, was implausible, though possible. Spitz believed all three shots to Henderson were fired in quick succession. Spitz also testified the bullet wound in Henderson's chest area was caused by a shot that was fired eight to ten inches away from her body. He could tell this because he saw gunpowder specks in her skin ("stippling") around the wound.

The jury convicted defendant of assault with intent to murder and felony-firearm. The trial court sentenced defendant to 13 to 30 years' imprisonment for the assault with intent to murder conviction and two years' mandatory imprisonment for his felony-firearm conviction. Defendant now appeals as of right. This Court denied defendant's motion to remand. *People v Cass*, unpublished order of the Court of Appeals, entered October 17, 2011 (Docket No. 302032).

II. INSANITY DEFENSE

Defendant first argues that he was deprived of the effective assistance of counsel when his trial attorney failed to raise an insanity or temporary insanity defense. We disagree.

An ineffective assistance of counsel claim is a mixed question of fact and constitutional law. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). "A judge first must find the facts, and then must decide whether those facts constitute a violation of the defendant's constitutional right to effective assistance of counsel." *Id.* A trial court's findings of fact are reviewed under a clearly erroneous standard. *Id.* Constitutional law questions are reviewed de novo. *Id.* However, because we denied defendant's motion to remand and no evidentiary

hearing was held, our review is "limited to mistakes apparent on the record." *People v Payne*, 285 Mich App 181, 188; 774 NW2d 714 (2009).

To prove ineffective assistance of counsel, a defendant must show counsel's performance was deficient and that the deficiency resulted in prejudice to the defendant. *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001). To show prejudice, defendant must demonstrate a reasonable probability of a different outcome were it not for counsel's deficiency. *People v Grant*, 470 Mich 477, 486; 684 NW2d 686 (2004). There is a "strong presumption that counsel's performance constituted sound trial strategy." *Carbin*, 463 Mich at 600. Counsel's performance must be evaluated without the benefit of hindsight. *Grant*, 470 Mich at 485. Counsel is ineffective in failing to raise a meritorious insanity defense. *People v Hunt*, 170 Mich App 1, 13; 427 NW2d 907 (1988). However, counsel is not ineffective for failing to advocate a meritless position. *Payne*, 285 Mich App at 191.

MCL 768.21a provides:

> (1) It is an affirmative defense to a prosecution for a criminal offense that the defendant was legally insane when he or she committed the acts constituting the offense. An individual is legally insane if, as a result of mental illness as defined in section 400a of the mental health code, Act No. 258 of the Public Acts of 1974, being section 330.1400a of the Michigan Compiled Laws, or as a result of being mentally retarded as defined in section 500(h) of the mental health code, Act No. 258 of the Public Acts of 1974, being section 330.1500 of the Michigan Compiled Laws, that person lacks substantial capacity either to appreciate the nature and quality or the wrongfulness of his or her conduct or to conform his or her conduct to the requirements of the law. Mental illness or being mentally retarded does not otherwise constitute a defense of legal insanity.
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> (2) An individual who was under the influence of voluntarily consumed or injected alcohol or controlled substances at the time of his or her alleged offense is not considered to have been legally insane solely because of being under the influence of the alcohol or controlled substances.
>
> (3) The defendant has the burden of proving the defense of insanity by a preponderance of the evidence.

While voluntary intoxication is not an affirmative defense, an affirmative defense of insanity may be based upon involuntary intoxication. *People v Caulley*, 197 Mich App 177, 186-187; 494 NW2d 853 (1992). "Involuntary intoxication is intoxication that is not self-induced and by definition 'occurs when the defendant does not knowingly ingest an intoxicating substance, or ingests a substance not known to be an intoxicant.'" *Id.* at 187, quoting *People v Low*, 732 P2d 622, 627 (Colo 1987). The defendant must show that "the involuntary use of drugs created a state of mind equivalent to insanity." *Caulley*, 197 Mich App at 187.

Defendant argues that he was deprived of the opportunity to raise an insanity defense based upon "pathological intoxication" because he was an alcoholic who had no control over whether or not to consume alcohol. "Pathological intoxication" is described as a form of

involuntary intoxication that is self-induced "in the sense that the defendant knew what substance he was taking, but which was 'grossly excessive in degree, given the amount of the intoxicant.'" LaFave, Criminal Law (2d ed), § 9.5(g), p 56. To be pathologically intoxicated, the defendant must be unaware that his ingestion of the intoxicant would produce an atypical reaction. *Id.* Defendant's argument is without merit. Pathological intoxication is not a recognized defense in Michigan, MCL 768.21a(2), and defendant fails to provide any authority to the contrary.

Moreover, there is no evidence in the record that the consumption of alcohol by the defendant was anything but voluntary. The evidence established defendant voluntarily consumed alcohol on the day of the shooting. He admitted to drinking two beers and two shots at the bar and drinking more wine when he arrived home. Defendant's BAC was .31 one and a half hours after the shooting. In fact, defendant testified regarding the shooting incident with surprising clarity given his extremely high BAC. Defendant's Presentence Investigation Report (PSIR) does indicate he abuses alcohol and has several drinks every day, but this merely establishes that he may be an alcoholic or an addict. The PSIR also shows defendant reported no mental health concerns. At sentencing, defendant stated that he "never had a problem with drinking." All evidence points toward defendant's intoxication being voluntary, rather than involuntary, and, therefore, inadequate to form the basis for an insanity defense where there is no indication defendant suffered a "settled condition of insanity before, during, and after the alleged offense." *Caulley*, 197 Mich App at 187 n 3. Defendant could not have presented a meritorious insanity defense in light of the circumstances and, therefore, counsel was not ineffective in failing to have defendant evaluated or to raise an insanity defense. See *People v Snyder*, 239 Mich App 393, 425; 608 NW2d 502 (2000).

Defendant also asserts that his constitutional rights were violated because he was not able, as an indigent defendant, to be evaluated by an independent expert during the course of the appeal in order to form a basis for an insanity defense. Having concluded that there is no indication defendant could have established a meritorious insanity defense, defendant's rights are not being violated by his inability to obtain an independent evaluation and, accordingly, we need not order one.[1]

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[1] We have recently decided the issue on similar facts in *People v Coronado*, unpublished opinion per curiam of the Court of Appeals, issued February 14, 2012 (Docket No. 302310). Though not binding precedent, it is persuasive. MCR 7.215(C)(1); *Beyer v Verizon North, Inc*, 270 Mich App 424, 430-431; 715 NW2d 328 (2006). In *Coronado*, we held:

> Defendant was not entitled to an evaluation for a temporary insanity defense for several reasons. First, no Michigan authority has recognized pathological intoxication as a valid defense, and we decline the invitation to even consider doing so in this case. MCL 768.21a(2). Second, no evidence suggested that defendant did not "knowingly" consume alcohol or that he was unaware of alcohol's intoxicating nature. Third, no evidence suggested that defendant suffered an "atypical" reaction to the amount of alcohol he consumed. Finally,

II. ADMISSIBILITY OF PHOTOGRAPHS

Defendant next argues the trial court improperly admitted photographs of Henderson's gunshot wounds because the relevance of the photographs was outweighed by unfair prejudice. We disagree.

This Court reviews a trial court's decision regarding the admissibility of evidence for an abuse of discretion. *People v Mardlin*, 487 Mich 609, 614; 790 NW2d 607 (2010). "An abuse of discretion occurs when the court chooses an outcome that falls outside the range of reasonable and principled outcomes." *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008). A trial court's decision on a close evidentiary question cannot be an abuse of discretion. *People v Layher*, 464 Mich 756, 761; 631 NW2d 281 (2001).

Evidence is admissible if it is relevant and not unduly prejudicial. MRE 402-403; *People v Feezel*, 486 Mich 184, 197; 783 NW2d 67 (2010). Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." MRE 401. All relevant evidence is prejudicial, but the prejudice is unfair only when it outweighs the probative value of the evidence substantially or, in other words, "'when there exists a danger that marginally probative evidence will be given undue or preemptive weight by the jury.'" *People v Novak*, 489 Mich 941, 942; 798 NW2d 17 (2011) quoting *People v Crawford*, 458 Mich 376, 398; 582 NW2d 785 (1998).

Photographs are admissible to corroborate testimony and "'[g]ruesomeness alone need not cause exclusion.'" *People v Mills*, 450 Mich 61, 76; 537 NW2d 909 (1995). The Michigan Supreme Court clarified the standard for admitting photographs as follows:

> Photographs that are merely calculated to arouse the sympathies or prejudices of the jury are properly excluded, particularly if they are not substantially necessary or instructive to show material facts or conditions. If photographs which disclose the gruesome aspects of an accident or a crime are not pertinent, relevant, competent, or material on any issue in the case and serve the purpose solely of inflaming the minds of the jurors and prejudicing them against the accused, they should not be admitted in evidence. However, if photographs are otherwise admissible for a proper purpose, they are not rendered inadmissible merely because they bring vividly to the jurors the details of a gruesome or shocking accident or crime, even though they may tend to arouse the passion or prejudice of the jurors. Generally, also, the fact that a photograph is more effective than [a]n oral description, and to the extent calculated to excite passion and prejudice,

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> defendant has not provided any facts beyond a history of substance abuse to support his claim that he suffers from pathological intoxication. As a result, a motion for a psychological evaluation very likely would have been futile, and defense counsel cannot be deemed ineffective for failing to advocate a meritless position. [*Id.* at slip op p 2-3.]

does not render it inadmissible in evidence. [*Mills*, 450 Mich at 76-77, quoting *People v Eddington*, 387 Mich 551, 562-563; 198 NW2d 297 (1972).]

Here, the prosecution sought to admit only two of the six photographs that showed Henderson's gunshot wounds. The location of the wounds and the trajectory of the bullets were key issues in this case, and the photographs were highly relevant in helping the jury determine whether Henderson's testimony was accurate and in evaluating defendant's self-defense claim. Additionally, the trial court actually redacted one of the photographs so that the jury could not see the pooling of Henderson's blood, finding that leaving the blood in would be irrelevant and unnecessary. The highly relevant nature of the photographs was not outweighed by any undue prejudice due to gruesomeness and, therefore, the trial court did not abuse its discretion by admitting the photographs.

III. SUFFICIENCY OF THE EVIDENCE

Defendant next argues that there was insufficient evidence presented at trial to convict him of assault with intent to murder. We disagree.

This Court reviews a claim of insufficient evidence de novo in the light most favorable to the prosecution and determines whether a rational trier of fact could find the elements of the crime were proven beyond a reasonable doubt. *People v Ericksen*, 288 Mich App 192, 196; 793 NW2d 120 (2010). However, this Court should not disturb the fact-finder's determinations of the credibility of witnesses or the weight of the evidence. *People v Passage*, 277 Mich App 175, 177; 743 NW2d 746 (2007), citing *People v Wolfe*, 440 Mich 508, 514-515; 489 NW2d 748 (1992), amended 441 Mich 1201 (1992).

"The elements of assault with intent to commit murder are '(1) an assault, (2) with an actual intent to kill, (3) which, if successful, would make the killing murder.'" *Ericksen*, 288 Mich App at 195-196, quoting *People v Brown*, 267 Mich App 141, 147-148; 703 NW2d 230 (2005). Defendant admits he shot and wounded Henderson, but claims the evidence does not show beyond a reasonable doubt that he intended to kill her, only that he intended to do her great bodily harm. Intent to kill may be discerned from circumstantial evidence and any reasonable inferences drawn from the evidence. *People v Lawton*, 196 Mich App 341, 350; 492 NW2d 810 (1992).

Here, the evidence, when viewed in the light most favorable to the prosecution, shows defendant woke Henderson up by screaming at her, then went out to the garage, got his gun, came back in the house, aimed the gun at Henderson, and shot her in the chest at point-blank range. He then shot her twice more in the posterior flank area after she had fallen to the ground. At some point during the shooting, defendant said to Henderson, "Take that, b****." Henderson's bladder, one of her kidneys, and one of her lungs were injured by the bullets, and she suffered a spinal injury that has paralyzed her for life. This evidence, when viewed in the light most favorable to the prosecution, was sufficient to allow a reasonable trier of fact to conclude that each element of assault with intent to murder had been proven beyond a reasonable doubt.

IV. SCORING OF OV 4

Defendant next argues that the trial court abused its discretion in scoring 10 points under OV 4. We disagree.

Defendant did not object to the scoring of OV 4 at sentencing. In fact, his counsel affirmatively stated, "We believe the scoring is extremely accurate and correct." Nor did defendant raise this issue in a motion for resentencing or in his motion to remand. Further, his sentence does not fall outside of the appropriate guidelines sentence range because defendant's minimum sentence range was calculated at 108 to 180 months, his minimum sentence was set at 156 months, and no scoring error occurred. Therefore, defendant has waived this issue and may not raise it on appeal. *People v Kimble*, 470 Mich 305, 310-312; 684 NW2d 669 (2004); MCL 769.34(10). Defendant also argues this issue can be reviewed on the ground that counsel was ineffective in failing to object to the scoring of OV 4 at sentencing. Our review is limited to errors apparent on the record. *Payne*, 285 Mich App at 188.

Application and interpretation of the sentencing guidelines is reviewed by this court de novo. *People v Bonilla-Machado*, 489 Mich 412, 419; 803 NW2d 217 (2011). With respect to scoring under each variable of the guidelines, "[a] sentencing court has discretion in determining the number of points to be scored, provided that evidence of record adequately supports a particular score." *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002). Therefore, errors in scoring are generally reviewed for an abuse of discretion. *Id.* "'Scoring decisions for which there is any evidence in support will be upheld.'" *Id.*, quoting *People v Elliott*, 215 Mich App 259; 544 NW2d 748 (1996). When a claim of error is not properly preserved, review is for plain error affecting defendant's substantial rights. *Kimble*, 470 Mich at 312; *People v Carines*, 460 Mich 750, 764; 597 NW2d 130 (1999); MCR 103(d).

OV 4 deals with psychological injury to a victim. MCL 777.34. Ten points are scored under this variable when "[s]erious psychological injury requiring professional treatment occurred to a victim." MCL 777.34(1)(a). When no serious psychological injury requiring professional treatment has occurred, zero points are scored. MCL 777.34(1)(b). Whether treatment has actually been sought is not conclusive; 10 points are scored "if the serious psychological injury *may* require professional treatment." MCL 7877.34(2) (emphasis added). The trial court may, in sentencing a defendant, rely on facts not determined by a jury, as long as evidence exists on the record that is adequate to support a score. *People v Jamison*, 292 Mich App 440, 443; 807 NW2d 427 (2011). Testimony at a defendant's sentencing hearing or information in a defendant's PSIR can be used to calculate defendant's sentence. See *People v Uphaus*, 278 Mich App 174, 183-184; 748 NW2d 899 (2008); MCL 771.14; MCR 6.425.

At defendant's sentencing hearing, Henderson stated:

> I don't think anyone can fully understand just how hard it is to be paralyzed and confined to a wheelchair. Simple, everyday things that people take for granted, like taking a shower, going to the bathroom or being able to go to the grocery store. Because of my injuries I have lost my job. I cannot drive and I have to depend on family and friends. I am struggling financially to keep a roof over my head and pay my bills. I spent two months in the hospital and my bills are overwhelming. The emotional and physical pain sometimes are unbearable.

> Because of [defendant]'s senseless act of violence I will never walk again. I cry every day and I cannot express enough what this has done to my 83 year[-]old mother. [Defendant] has also taken away the special bond I had with my father, who is in a nursing home with dementia. I no longer can spend time with him, and because of that he no longer knows me.

Additionally, defendant's PSIR provides:

> Ms. Henderson stated that she cannot express the psychological damage that the instant offense has had on her. She has not sought treatment yet, but has checked into Turning Point for counseling referrals. She stated that[,] because of the defendant's anger on the night of the offense, she is afraid that upon his release, he will seek her out and finish what he started.

This information was sufficient to allow the trial court to score 10 points under OV 4. Therefore, the trial court did not abuse its discretion and, accordingly, defendant is not entitled to remand for resentencing.

Defendant also argues that he must have either admitted that Henderson suffered serious psychological injury requiring professional treatment, or that the jury found the same beyond a reasonable doubt, in order to score 10 points for OV 4 and thereby increase defendant's sentence. Due process demands this procedure when a sentence is increased beyond the statutory maximum. *Blakely v Washington*, 542 US 296, 305; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, this rule does not apply to Michigan's indeterminate sentencing scheme, because the maximum sentence is not determined by a judge but is, instead, set by statute and, therefore, always derives from the jury verdict. *People v Drohan*, 475 Mich 140, 160; 715 NW2d 778 (2006). Accordingly, defendant's due process rights were not violated when the trial court used facts not admitted to by defendant, or found by a jury beyond a reasonable doubt, when it scored 10 points under OV 4.

V. DEFENDANT'S SENTENCE

Defendant next argues that the trial court erred in sentencing defendant to 156 to 360 months for assault with intent to murder. We disagree.

If a minimum sentence is within the appropriate guidelines sentence range, any sentencing issue besides a scoring error or inaccurate information is not reviewable. MCL 769.34(10). Claims of scoring error or inaccurate information must be preserved by raising the motion at sentencing, in a motion for resentencing, or in a motion to remand filed in the court of appeals. MCL 769.34(10). Here, as noted, defendant's minimum sentence is within the appropriate guidelines sentence range. Defendant did not raise this issue at sentencing or in a motion for resentencing, nor did he raise scoring errors or claims that the information relied upon was inaccurate in his motion to remand. Furthermore, defendant concedes on appeal that this issue was not preserved, and that review should be for plain error affecting defendant's substantial rights or, alternatively, grounded in ineffective assistance of counsel. As discussed, defendant's motion to remand for a hearing on the issue of ineffective assistance of counsel was

denied and our review is limited review to mistakes apparent on the record. *Payne*, 285 Mich App at 188.

MCL 769.34(10) precludes appellate review of sentences if the minimum sentence is within the appropriate guidelines sentence range and there is no scoring error or inaccurate information relied upon by the trial court. This Court is limited to determining whether a sentence fell within the appropriate guidelines range and, if not, whether the trial court articulated a substantial and compelling reasons for the departure. *People v Babcock*, 469 Mich 247, 272-273; 666 NW2d 231 (2003). It is difficult to articulate the proper standard of review for defendant's claim because, under Michigan's indeterminate sentencing scheme, sentencing considerations revolve around application and interpretation of the guidelines and the scoring of offense and prior record variables. MCL 777.21 *et seq*. Here, defendant is asking this Court to review the trial court's actions based on principles of federal constitutional law which are not based on an indeterminate statutory sentencing scheme. Nonetheless, questions of constitutional law are reviewed de novo, and insofar as a trial court's determination of the length of a sentence is akin to its acts in scoring sentencing variables, such decisions are reviewed for an abuse of discretion. *LeBlanc*, 465 Mich at 579; *Hornsby*, 251 Mich App at 468. Unpreserved claims of error are reviewed for plain error affecting defendant's substantial rights. *Carines*, 460 Mich at 764.

A. ARTICULATION OF REASONS FOR SENTENCE

In support of his claim that his sentence is improper, defendant first argues that the trial court failed to articulate how it arrived at a 30-year maximum sentence or how the maximum and minimum sentences were proportionate to the crimes and to defendant.

A trial court must articulate, on the record, its reasons for imposing a particular sentence. *People v Triplett*, 432 Mich 568, 573; 442 NW2d 622 (1989). Express or implied reliance on the sentencing guidelines is sufficient to meet this standard. *People v Conley*, 270 Mich App 301, 313; 715 NW2d 377 (2006).

Here, the trial court began the sentencing hearing by discussing the PSIR and allowing the parties to comment on its accuracy, and then facilitated discussion about the scoring variables to which the prosecution objected. The trial court stated that the sentencing guidelines indicated defendant's minimum sentence should be set between 108 and 180 months. The PSIR also shows the trial court scored the offense variables in order to calculate defendant's sentencing guideline range and sentenced defendant within that range, at 156 to 360 months. The trial court explicitly relied upon the sentencing guidelines and, therefore, did not err in failing to articulate, to any greater extent, the reasons for imposing defendant's particular sentence.

B. MITIGATING FACTORS

Defendant also claims the trial court improperly failed to consider mitigating factors in his favor, including remorse, strong family support, and substance abuse and mental health concerns.

Under the Michigan sentencing guidelines, a trial court determines a defendant's minimum sentence by scoring his offense variables and prior record variables and determining

what class and type of crime the defendant has committed and whether he is a habitual offender. MCL 777.21. A trial court does not abuse its discretion when there is no evidence that it failed to consider relevant mitigating factors. *People v Nunez*, 242 Mich App 610, 618; 619 NW2d 550 (2000). Defendant cites *Eddings v Oklahoma*, 455 US 104, 114-115; 102 S Ct 869; 71 L Ed 2d 1 (1982), for the proposition that a sentencing court may not categorically refuse to consider relevant mitigating evidence. However, *Eddings* is clear that the sentencing court may determine what weight to give relevant mitigating evidence. *Id.*

Defendant asserts the trial court failed to consider his strong family support, his remorse, and his mental status as mitigating factors for purposes of sentencing. However, the trial court listened to defendant express remorse at sentencing. Additionally, defendant's PSIR noted his strong family support and his substance abuse concerns. This information was clearly presented to the trial court before sentencing and there is no indication that the court refused to consider it. Therefore, the trial court did not abuse its discretion by failing to consider relevant mitigating circumstances when it sentenced defendant. Defendant's argument that a defendant who has shown by a preponderance of the evidence that he has accepted responsibility for his actions is entitled to a reduction in his offense level is based solely on the Federal Sentencing Guidelines and is, therefore, inapplicable here.

C. INACCURATE INFORMATION

Defendant next asserts the trial court relied on inaccurate information in sentencing defendant. The record does not support defendant's claim.

A defendant is entitled to be sentenced on the basis of accurate information. *People v McGraw*, 484 Mich 120, 131; 771 NW2d 655 (2009). "'A sentence is invalid if it is based on inaccurate information.'" *People v Jackson*, 487 Mich 783, 794; 790 NW2d 340 (2010), quoting *People v Miles*, 454 Mich 90, 96; 559 NW2d 299 (1997). A defendant's medical and substance abuse history must be included in his PSIR and, *depending on the circumstances* and "*if indicated*, a current psychological or psychiatric report." MCR 6.425(A)(1)(e) (emphasis added).

Here, defendant's PSIR included his physical and mental health history and substance abuse issues. There is no indication this information is inaccurate, and insofar as defendant claims it is inaccurate on the ground that defendant's rehabilitative potential was not assessed, MCR 6.425 does not require any such assessment. All required information was included and, therefore, defendant's claim fails.

D. CRUEL AND UNUSUAL PUNISHMENT

Defendant also argues his sentence is cruel and unusual. A sentence that falls within the applicable guidelines range is presumptively proportionate. *People v Powell*, 278 Mich App 318, 323; 750 NW2d 607 (2008). A proportionate sentence is not cruel and unusual. *Id*.

Here, as noted, defendant's sentence falls within the appropriate guidelines sentence range and is, therefore, presumed proportionate. In support of his argument that his sentence is disproportionate, defendant claims only the trial court's failure to consider relevant mitigating factors. As discussed above, the trial court did not improperly fail to consider mitigating

circumstances. Therefore, defendant has not overcome the presumption that his sentence is proportionate and, accordingly, his sentence is not cruel or unusual.

Defendant claims that the trial court considered only two of the four sentencing considerations articulated in *People v Snow*, 386 Mich 586, 592; 194 NW2d 314 (1972): (1) rehabilitation; (2) deterrence; (3) protection of society; and (4) punishment. Defendant asserts that the court here failed to consider defendant's need for rehabilitation and deterrence, particularly given his alleged substance abuse and mental health issues. However, failing to comment on each of these factors does not render a trial court's sentencing rationale improper. *Nunez*, 242 Mich App at 618. Further, as noted, all necessary information about defendant's mental health and substance abuse status was properly presented to the trial court, and there is no indication the court did not consider it.

Defendant again asserts *Blakely* to support his argument that the sentence imposed was cruel and unusual because it punished him beyond the extent allowable if only facts admitted by defendant or found by a jury could be used in sentencing. As we pointed out earlier, *Blakely* is inapplicable to Michigan's indeterminate sentencing scheme. *Drohan*, 475 Mich at 160. Therefore, this argument fails.

E. IMPOSITION OF ATTORNEY FEES

Finally, defendant argues that the trial court erred by ordering him to pay attorney fees without holding a hearing to determine defendant's ability to pay. We disagree. Whether the procedure used to impose and enforce payment of attorney fees by an indigent defendant is a question of constitutional law which this Court reviews de novo on appeal. *People v Jackson*, 483 Mich 271, 277; 769 NW2d 630 (2009).

MCL 769.1k provides:

> (1) If a defendant enters a plea of guilty or nolo contendere or if the court determines after a hearing or trial that the defendant is guilty, both of the following apply at the time of the sentencing or at the time entry of judgment of guilt is deferred pursuant to statute or sentencing is delayed pursuant to statute:
>
> > (a) The court shall impose the minimum state costs as set forth in section 1j of this chapter.
> >
> > (b) The court may impose any or all of the following:
> >
> > > (i) Any fine.
> > >
> > > (ii) Any cost in addition to the minimum state cost set forth in subdivision (a).
> > >
> > > (iii) The expenses of providing legal assistance to the defendant.

The Michigan Supreme Court ruled in *Jackson* that a defendant's constitutional rights are not violated when a trial court fails to hold a hearing to determine an indigent defendant's ability to

reimburse the state for court-appointed attorney fees at the time the court imposes an order to pay such fees. *Jackson*, 483 Mich at 275. The constitution requires only that an ability-to-pay hearing be held at the time of enforcement of the order. *Id.* at 292-293.

Here, the trial court imposed an order on defendant to pay attorney fees without conducting a hearing to determine whether he had the ability to pay. The trial court did not err in doing so under *Jackson*.

Affirmed.

/s/ William C. Whitbeck
/s/ Kathleen Jansen
/s/ Kirsten Frank Kelly